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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 4

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM DISTRICT COURT, EASTERN DISTRICT OF WASHINGTON.

APPELLANTS' REPLY BRIEF.

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> only primary grant in the Resolution was contained in the words "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation,' namely the Act of July 2, 1864." (p. 205. Italics supplied).

and again:

> "With respect to the lands within the Tacoma Overlap, the Resolution of 1870 added to the Act of 1864 made the whole action of Congress one grant of specifically described land, accomplished by two consistent steps." (p. 209).

Though plaintiff contends for the same result, its reasons are very different from the Master's. It is a case of reaching the same destination by very different routes.

Plaintiff does not say that the Tacoma-Portland line was not constructed under the Joint Resolution of 1870, nor that the Cascade line was not constructed under the Act of 1864. Those questions have been definitely set at rest by repeated decisions of this Court. Plaintiff must and does admit that they are decisive. But plaintiff contends that the company's rights are *exactly the same* as if the Tacoma-Portland line had been constructed under the Act of 1864. This is but a quibble. Plaintiff's position cannot be sustained without overruling those decisions.

This question is a simple and narrow one, namely: Did the Resolution of 1870 authorize a new line, make a new grant, and an indemnity privilege therefor?

This question has so often been answered in the affirmative that we need only cite the cases.

In *United States v. Northern Pacific*, 152 U. S. 284, it was contended that the Act of 1864 authorized construction

of the Portland-Tacoma line, and that the Joint Resolution was a mere recognition or confirmation thereof. The court said:

> "There was no purpose, *by that act,* (of 1864) to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget Sound." (p. 293).

Of the Resolution, the Court said:

> "We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. *On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its* vicinity with Puget Sound." (p. 294). (Italics supplied).

In *Northern Pacific R. Co. v. DeLacey,* 174 U. S. 622, 626, the question was whether lands in this overlap had passed under the Act of 1864 or Resolution of 1870. The court said:

> "The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, *between Portland and Puget Sound,* dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. *United States v. Northern Pacific Railroad Company,* 152 U. S. 284, 292."

The court further said:

> "The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. *It was not an amendment to the third section of the act of 1864 which granted the lands.*" (p. 628).

This language recognizes that the two grants are as distinct as if made to different grantees. In the *McRae Case*, 6 L. D. 400, Secretary Lamar said:

> "I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of *twenty sections per mile* on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line via the valley of the Columbia river through *Portland to Puget Sound.*" (p. 401). (Italics supplied).

The Company will not receive 40 sections per mile unless it have indemnity lands in lieu of the overlap area. That it should was the only reason for the indemnity clause.

United States v. O. & C., 176 U. S. 28, is a clear recognition that the company's right to lands coterminous to the Portland-Tacoma line, whether place or indemnity, rests solely upon the Joint Resolution. In that case the question was whether the grant by the 1864 act for the unlocated and unconstructed Columbia River line operated to exclude the land from the later grant to the Oregon & California Railroad. The court held that the Northern Pacific's rights under the Act of 1864, had been *completely extinguished*

by the General Forfeiture Act of 1890, and so the lands passed to the O. & C. under its later grant of 1866. At p. 50 of the opinion the court said:

> "The only effect therefore of the joint resolution, as between the Northern Pacific Railroad Company and the Oregon Company, was to confer upon the former company the right to receive other lands in lieu of those appropriated by the latter company under the authority of the act of 1866."

This case is conclusive that the 1870 grant is *independent* of the 1864 grant, because all rights of the Northern Pacific under the latter *had been forfeited* by *the Act of 1890*. If it be held that the "Resolution of 1870 made no primary grant * * * separate from the Act of July 2, 1864", the *O. & C. Case must be overruled. It decides point blank against plaintiff's position.* It is also point blank *against the decision below.*

United States v. Northern Pacific, 193 U. S. 1, holds that the rights of the Northern Pacific to the overlap lands there involved coterminous to the unconstructed Columbia River line were exactly the same, under the Joint Resolution of 1870, as the rights of the Oregon and California to its place lands under its grant of 1866. The United States, at p. 209, states that this case decided only that the Northern Pacific was not estopped to question the sufficiency of the Perham map of definite location. Counsel is mistaken. *United States v. Northern Pacific,* 193 U. S. 1, holds exactly what is stated at p. 42 of our opening brief. In 193 U. S. 1, Special Assistant Attorney General, Charles W. Russell, contended:

> "The facts differ from those in the *Oregon and California Case,* 176 U. S. 28, for in this case there is no

> overlap but a peculiar single scheme *concerning one road and one grantee.* Every granting act is a separate law, and its intent is to be separately inquired into. * * * Congress expected in 1870 that one whole road would be built, and had no expectation that a failure would occur at any particular point." (193 U. . p. 2). (Italics supplied).

The attempted distinction of the O. & C. case was denied. The certificate of the Court of Appeals is as follows:

> "it appears to the court 'that the case presents issues and facts identical with those which were involved in the case of the *United States v. The Oregon & California Railroad Company,* 176 U. S. 28, with this difference, that the defendant, the Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to, unless the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864." (p. 8).

Of course, if the company was estopped, that ended the controversy. But it was held that the company was not so estopped. Therefore, the court had to decide whether the fact that the Northern Pacific was the grantee of both grants distinguished the *O. & C. Case.* The court held on this point that the General Forfeiture Act of 1890 was just as effectual to eliminate *all claims of the Northern Pacific under the 1864 act in favor of claims of the same company under the 1870 act as it was to free the lands in favor of the O. & C. under its later act of 1866.* The court said:

"We do not think the fact that the Northern Pacific Company was the grantee in both grants limits the force of this decision. The resolution of 1870 and the act of July 2, 1864, were *in pari materia, and no reason is perceived for holding that the act operated to exclude from the subsequent grant by the resolution.*" (p. 9). (Italics supplied).

This, it seems to us, is the same as to say that the indemnity rights of the Northern Pacific under the 1870 act are exactly the same as in the case of conflict with a prior grant to a different company. In other words, the grants being independent and distinct, the fact that the later grant is to the same company is without legal significance. Of course, it must be so if the intent of the later grant is to be carried out. The grant was to aid a *new* railroad. A loss under a prior grant would be just as much a loss of aid to a new railroad to be built by the Northern Pacific as to a new railroad by any other company. It does not lie with the court or anyone else to say that full forty sections per mile were not *needed.* In *Northern Pacific v. Townsend,* 190 U. S. 267, (holding that title to the 400 ft. right of way could not be acquired by adverse possession) the court said, quoting from *Northern Pacific Railroad Co. v. Smith,* 171 U. S. 261, 275:

"'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the pur-

poses of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

"To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed." (p. 272).

The Resolution of 1870 conferred the "privileges, grants and duties" of the 1864 Act. Full forty sections were, therefore, declared to be necessary. Provision was made for indemnity for losses to the 1870 grant exactly as for the 1864 grant. No exception was made to the right of indemnity for losses by the inevitable conflict with the prior grant. There was full discussion in Congress, as shown by the debates quoted by Secretary Lamar in the *McRae Case* and in the marginal note, p. 295, 152 U. S. 284.

Since the decision in these cases, and in fact, since the *McRae Case,* it was never questioned that the Northern Pacific was entitled to a full grant and indemnity. The grants were administered accordingly. Second indemnity belts were laid down on both sides of the 1870 grant in Oregon and Washington upon demand of the company. Lands have been patented to the company in second indemnity limits in both Oregon and Washington. See as to Washington Finding III (n), (R. 619). Evidence (R. 796) is as follows:

"Said Exhibit 207 Revised shows that there had been charged to the grant and approved properly and patents issued in *second indemnity* limits of Oregon for 5,981.96 acres and that the Railway Company had selected 40 acres in said second indemnity limits."

The laying down of second limits in Washington and selection of lands in those limits were not possible unless there was a full grant of forty sections per mile by the Joint Resolution and the Overlap area was a loss to the 1870 grant, for which indemnity was due. The Government has not yet said that these selections in Oregon and Washington second limits and patents were unauthorized.

The findings and decree in this case recognize that the grants are separate and distinct and were so administered from an early date. Finding III (o) (R. 619):

> "It also had available at said time 28,436.14 acres of which 14,462.11 acres were prior and 13,974.03 acres were subsequent losses in the 1870 grant in Washington *formerly used to make selections in the 1864 grant.* Said 28,436.14 acres were erroneously used as base to select lands in the 1864 grant, and said error has been corrected by crediting the acreage back to the 1870 grant and charging to the 1864 grant an equal number of losses in that grant." (Italics supplied).

This correction was made upon plaintiff's insistence and agreed to by the Company. It was plaintiff's position, and always has been, that the grants had to be separately administered, that losses in one grant could not be satisfied in the other, that neither party obtained any rights or incurred any obligations under one grant by reason of anything done or omitted under the other. Had the Northern Pacific never built a single mile of the 1864 line, it would have received its full grant for the 1870 line and vice versa. This was never questioned until now.

It has been shown in our opening brief under point 7, p. 33, that if the rights of the company are the same under the Joint Resolution as if both lines had been constructed

under the 1864 act, there would have been a continuous line via Puget Sound to Portland, and in that case the decision of this court in *United States v. Union Pacific*, 148 U. S. 562, is conclusive that the company would have been entitled to the lands in the quadrant northwest of Tacoma, as shown on the sketch, p. 2 of the brief. But the grant has never been so administered, and the company has never received any of that land. If this was a mistake, the Government has long been estopped to correct the supposed error. *United States v. Winona & St. Peter*, 165 U. S. 463, was an action to cancel patents to certain lands alleged to have been erroneously certified to the state for the benefit of the railroad company. Relief was denied among other reasons because the Government had not shown *affirmatively*, that there were not other lands that the company might have received but for the mistake in patenting the lands in controversy. The court said:

> "but lastly, and chiefly, that it does not appear from this record either that the railroad company received an excess of lands, *or has even received* (these lands included) the full quantity of lands promised in the grant; and further, *that it does not appear that there were not within the granted or indemnity limits lands which the company might have rightfully received but for this erroneous certification.* It will hardly be contended that, if simply through a mistake of the land department, these lands were certified when at the time other lands were open to certification which could rightfully have been certified and which have since been disposed of by the Government to other parties, so that there is now no way of filling the grant, the Government can nevertheless recover the value of the lands so erroneously certified. In other words, the mistake of the officers of the Government cannot be

both potent to prevent the railroad company obtaining its full quota of lands, and at the same time potent to enable the Government to recover from the company the value of lands erroneously certified." (p. 482). (Italics supplied).

If the Government is now correct in saying that the rights of the company are the same as if both lines were built under the same act, the company would have received approximately 400,000 acres northwest of Tacoma as shown on sketch, p. 2 of our main brief, comprising the cities of Tacoma, Seattle and the shores of Lake Washington, as held in *United States v. Union Pacific R. Co., supra.* In that event, of course, it would not be entitled to receive and would not claim indemnity in favor of the 1870 line for the Overlap area. Those lands, of course, are not now being tendered by plaintiff in lieu of indemnity for the Overlap. If this loss was due to the mistaken administration by the Government, certainly that error cannot be given potency to deprive defendant of any lands whatsoever.

Finally, there is the Southern Pacific adjustment by which that company was awarded indemnity for the loss under the earlier main line grant of lands which it would have received under the later branch line grant. We said in our opening brief, and repeat, that that adjustment *gave to the Southern Pacific exactly what is denied here.* The Government, p. 211, states that the circumstances of the Southern Pacific grant are different. Both grants were to the Southern Pacific as here they were to the Northern Pacific. The railroad systems were no more different in the one case than in the other.

At p. 205 plaintiff compares the Tacoma Overlap with the conflict at Pasco where the main line departs from the

branch line, both authorized by the 1864 Act, and cites *United States v. Oregon &c. Railroad Co.*, 164 U. S. 526, 536. At p. 206 it is said:

> "The extension created an overlap at Portland and at Tacoma, no different in character from the overlap *created at Pasco by the original Act.*" (Italics supplied).

The two situations are totally different. The conflict described in 164 U. S. 526 was exactly like the conflict between the Northern Pacific lines at Pasco in that both conflicts were created by a grant by the same act to the same grantee for a main line and a branch, and the grant for the main line was forfeited. If the Northern Pacific had built both lines, it could not have had indemnity, and, in fact, it has received only what it actually earned, which is what the court held the O. & C. was entitled to in the case cited. But the Tacoma Overlap was caused by conflict between separate and distinct grants. The situation, therefore, is exactly like that presented by the Southern Pacific adjustment, discussed in our opening brief at p. 43.

Second: Plaintiff contends, Brief p. 212, that second indemnity limits were not authorized for the Portland-Tacoma line by the resolution of May 31, 1870. It is said the amount of lands granted to said company *"within the limits prescribed by its charter"* means the limits of the 1864 grant, that

> "The land which the company could get was *just as much limited by the end lines as it was by the side lines.*" (Italics supplied).

But for the eminence and learning of counsel, we would almost say that this contention hardly deserves consideration.

It was decided against plaintiff by the court and Master below. The Master said (R. 507):

> "As appears in the discussion of the 1864 grant, the joint resolution of 1870 provided a second indemnity belt for satisfaction of losses to the amount suffered subsequent to July 2, 1864, in any state or territory where the first indemnity belt was insufficient to meet the losses at date of final location in the particular state or territory. Should that apply to the newly subsidized extension from Portland to Tacoma? Plaintiff urges that it should not; that Congress intended to provide second indemnity only to take care of situations where, in the interval between 1864 and 1870, settlers had gone in and depleted the limits originally prescribed. There would be great force in the argument if it were not that the resolution plainly provides otherwise. The second indemnity provision is set out in full at page 2 (R. 423) of this report. The phrase 'said main line' where it twice occurs, refers back, both grammatically and logically, to the 'main road to some point on Puget Sound, via the valley of the Columbia River.' No distinction is made between the old main line and the new. It therefore seems clear that the resolution authorized second indemnity opposite the new line, provided, of course, the lands in first indemnity, at the time of final location in the particular state or territory, Oregon or Washington, were insufficient to supply the losses."

The point has been resurrected from the distant past. It was laid to rest by the decision of First Assistant Secretary Pierce in *Northern Pacific Railway Company* (Nov. 24, 1908), 37 L. D. 272. After observing that it was difficult (for him) to perceive why Congress should have made a grant of second indemnity on account of the Portland-Tacoma line, he said that such considerations did not war-

rant doing violence to the plain letter of the statute. He continued as follows:

"It authorizes the company to construct its main line by way of the Columbia River to Puget Sound. This makes the line from Portland to Puget Sound part of its main line, and it is provided that in the event of there not being within any state in which said main line may be located 'the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then the said company shall be entitled * * * to receive so many sections of land * * * within ten miles on each side of said road beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch.'

"It will be observed that the grant is for the whole of the main line as thereby constituted. No difference is made or indicated between the old main line and the new one. The grant of second indemnity is on account of deficiencies *'on said main line'* and there is no language indicating a purpose to exclude any portion of it. The language therein, 'the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter,' refers to the measure of the grant made by the act of 1864 within *lateral limits* and has no reference to *terminal points.*

"To argue otherwise is to say that no grant of lands of any sort was made on account of the line of road between Portland and Puget Sound, for if the limits prescribed by the company's charter refer to terminal limits, then the joint resolution of 1870 cannot in terms or by necessary implication be said to make a grant on said line either in place or for indemnity. On the other hand, it must be said that if a grant of lands was made on account of that line at all, there was just as surely a grant of second indemnity lands as of lands in place." (pp. 275, 276).

There was no occasion for the Secretary to be puzzled to know why a grant of second indemnity limits was made. The reason is that the grant of 1870 was deficient from the beginning (Master's Report, R. 521). Finding III (k) (R. 618) is that, "All the lands in place limits of Oregon had been lost to the grant." Government Exhibit 210, Revised, Statement of Adjustment of the entire grant of 1870 shows the following:

		Acres
Gross area within limits		2,827,438.70
Less area of Tacoma Overlap unearned		637,580.99
		2,189,857.71
Lost to grant:		
Prior to act of July 2, 1864:		
Entries and Filings	264,183.61	
Withdrawals	8,734.97	272,918.58
Mineral surveyed		3,233.66
Between act July 2, 1864 and definite location:		
Entries and Filings	200,806.70	
Conflicting grant	342,196.40	
Withdrawals	2,593.21	545,596.31
Total losses to grant (excluding Overlap)		821,748.55
Total losses to grant (including Overlap)		1,459,329.45

It is thus seen that, excluding the Overlap as a loss, the grant in place limits at its date had suffered losses to settlers of at least 264,183 acres and to the O. & C. and Oregon Central (conflicting grants) of 342,000 acres, a total of 600,000 acres which must have been known to Congress.* The same exhibit shows the total area of first indemnity limits of the entire grant to be only 761,214.33 acres. So that with the natural depletion in first indemnity limits by settlers, it must have been apparent to Congress that second indemnity limits were required. In fact, said Govt. Ex. 210 Rev. shows that all the company ever received was 225,265.23 acres in first indemnity limits of the entire grant of 1870.

It is undisputed that second indemnity limits were laid down in both Oregon and Washington upon demand of the company (R. 805), and the propriety of doing so after Secretary Pierce's decision was never questioned until this controversy arose. In the meantime lands have been patented to the company in second indemnity limits in both Oregon and Washington, and it was never said, and it is not even yet said, that those lands were improperly patented. The Government has not questioned the company's title in this case or otherwise.

In all plaintiff's exhibits covering the 1870 grant they show losses both prior to and subsequent to July 2, 1864 as losses to the 1870 grant. There is no point to a distinction between prior and subsequent losses unless second indemnity limits were authorized, for the only purpose of setting up "subsequent losses" is to measure the rights of the company

*The Oregon & California grant was by Act of July 25, 1866, 14 Stat. 239 (See 176 U. S. 28). The Oregon Central Railroad grant was by Act of May 4, 1870, 16 Stat. 94 (See 152 U. S. 284).

in second indemnity limits, in accordance with the Joint Resolution of 1870.

In fact, in United States v. Northern Pacific, 152 U. S. 284, at p. 296, the court recognizes that the phrase, "within the limits prescribed by its charter", means *lateral* limits, not *end* limits, as plaintiff now says. The court said:

> "And by the resolution of 1870 it was declared that if at the time of the final location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands, *within ten miles beyond those limits,* * * *." (Italics supplied).

Again in *United States v. O. & C. R.*, 176 U. S. 28, at p. 50, the court said that the Joint Resolution, on its face, shows that some of the lands might have been disposed of "subsequent to the passage of the Act of July 2, 1864", "and in lieu thereof the company was authorized * * * to receive other lands." Lands lost "subsequent to the passage of the Act of July 2, 1864" were "subsequent losses", and, as stated above, the amount of those losses is the measure of the company's right to indemnity in second indemnity limits. The court in the *O. & C. case* held that the lands there involved were a "subsequent loss" to the grant of 1870 for which the company could obtain indemnity, and thus clearly recognized that second indemnity limits were authorized for that grant.

Third: Plaintiff contends that all indemnity rights have been forfeited or lost because the Columbia River line was not constructed to a connection with the line between Portland and Tacoma. This argument is made in various other connections, and is answered in our brief on the Govern-

ment's appeal under the heading, "Forfeiture." It has been shown that no rights were lost except those pertaining to the unconstructed line forfeited by the Act of 1890. The decisions in *United States v. Northern Pacific*, 152 U. S. 284; *United States v. Northern Pacific*, 193 U. S. 1; and *United States v. Northern Pacific*, 256 U. S. 51, establish the company's right to its land grant opposite this line.

The Joint Resolution of April 10, 1869 is referred to on page 221. The company has never claimed any rights under that resolution. There is not a single decision either of the Land Department or of this court or of any other court based on that resolution. In *United States v. Northern Pacific*, 152 U. S., *supra*, at p. 293, the court said:

> "It is said that the company did not take action under this resolution (1869) *and did not accept it in any form.* * * * Coming next to the joint resolution of May 31, 1870, *which was accepted and acted upon by the company*" etc. (Italics supplied).

The decision of this court in 152 U. S. 284, and 193 U. S. 1, and in *Northern Pacific v. DeLacey*, 174 U. S. 622, (where the Government was a party by intervention) are *res adjudicata* that defendant constructed the Portland-Tacoma line under the Resolution of 1870. This contention was not made below.

In *United States v. O. & C. R. Co.*, 164 U. S. 526, the grant was for a line from Portland to Astoria and from a point of junction near Forest Grove to the Yamhill River near McMinnville. The company constructed the line from Portland to Forest Grove and thence south to McMinnville. It located but did not construct from Forest Grove to Astoria and the grant therefor was forfeited by Congress.

By Section 3 provision was made for accepting the line in twenty mile sections and for patents for the lands coterminous to the completed sections. In these features the grant is the same as that by the Act of 1864 for a main line to Puget Sound and a branch line to Portland, with provision for accepting completed portions and issuing patents for coterminous lands. The court said at p. 542 that the grant contemplated a main line from Portland to the junction with the branch and a branch at substantially right angles, and devoted the lands north of the junction to the road from Portland to Astoria. The court then said:

> "and while the company was left free to construct parts of the road as might suit its convenience, its action could not change the effect of the grant or control its administration" etc.

In this case the railroad company was given its full grant for the full number of miles it constructed, unaffected by failure to complete the balance of the main line from Forest Grove to Astoria. The case is directly opposed to the Government's position that the company lost any lands or

rights by not constructing the Columbia River line, except such lands and rights as would have been earned by its construction.

Respectfully submitted,

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